

PREVAILING WAGE RATES AND PUBLIC-PRIVATE PARTNERSHIPS

RELU SECTION ANNUAL MEETING 2008

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BACKGROUND

Until 2003, issues relating to the application of prevailing wage rates to Oregon public works projects were the mundane stuff of state and municipal attorneys and the attorneys representing contractors bidding on road projects, water and sewer projects, and public facilities construction, such as city halls, libraries and schools. Beginning in 2004, then Labor Commissioner Dan Gardner began a broad based campaign to apply prevailing wage rates to construction projects that involved public financial participation in private projects. The Commissioner argued that the participation of government in private construction projects constituted the public agency “contracting for” the construction¹, resulting in the application of prevailing wage rates to the private project.

An early Bureau of Labor and Industries (BOLI) enforcement action applied prevailing wage rates to an affordable housing project built by a private developer on land adjacent to the construction of the Hillsboro Civic Center. The City entered into one contract for the development of the Civic Center and the disposition and development of the property for the housing project. The Civic Center construction was clearly a public work, and the developer’s contractor paid prevailing wage rates for the Civic Center. The developer assigned its rights to a third party to acquire and develop the affordable housing site. BOLI sought to require commercial prevailing wage rates on the affordable housing project. The City settled the matter.

BOLI’s scrutiny notably focused on so-called “public-private partnership” development deals. The large size and broad scope of some public-private projects, and the increasing frequency of the use of this tool, attracted the attention of certain trades and made disputing the application of prevailing wage rates worthwhile. Urban renewal agencies are often the public partner participant to encourage private development in blighted areas of their jurisdiction. These public-private partnerships take various forms, including loans and grants property owners, payment of development and permit fees, and commitment by the public agency to complete certain infrastructure in support of the proposed private development.

Often an urban renewal agency has real property to transfer for development, and enters into a “disposition and development agreement” which requires certain improvements to the

¹ Former ORS 279.348-279.380, renumbered in 2003 to ORS 279C.800-279C.870.

transferred property on a stated time schedule.² The Medford Urban Renewal Agency (MURA) was among the first to learn that BOLI was taking a strong stand on public-private projects. In a written determination by the local office, BOLI required application of prevailing wage rates to a proposed private apartment project to be built in the air rights above a proposed parking garage. MURA's disposition and development agreement obviously required the City to build the parking structure as the platform before the developer could build the apartments. BOLI found that the garage construction and the apartment construction were one project, contracted for by MURA, and prevailing wage rates would apply to the entire construction. Unfortunately, the private development did not proceed, although Medford does have its downtown parking structure.

In 2004 and 2005 two significant cases reached the courts.

Portland Development Commission v. State of Oregon, 216 Or App 72, 171 P3d 1012 (2007)

The Portland Development Commission (PDC) as the urban renewal agency of the City of Portland, entered into a disposition and development agreement which,

- Contracted to transfer real property to a private owner for fair market value;
- Required the transferee to rehabilitate existing improvements on the transferred property according;
- Required the transferee to comply with PDC policies relating to job creation and property rehabilitation;
- Required PDC to fund certain street improvements in support of the project; and
- Provided for a PDC loan to the transferee to finance a portion of the purchase price.

Transferee contracted for the rehabilitation of the property. PDC was not a party to the construction contract and PDC did not contribute funds to the rehabilitation. Prevailing wage rates were paid for the street improvement work.

BOLI contended that the entire project, public improvements and private rehabilitation, was subject to prevailing wage rates because PDC had "contracted for" the private rehabilitation. The Multnomah County Circuit Court disagreed, finding that PDC had neither "carried on" nor "contracted for" the private rehabilitation. The Court of Appeals affirmed.

² ORS 457.230 requires a transferee of urban renewal agency land to begin construction of improvements that are consistent with the urban renewal plan within a time period that the urban renewal agency deems is reasonable.

BOLI v. Salem Urban Renewal Agency, Marion County Circuit Court No. _____
(2007)

The Salem Urban Renewal Agency (Agency) and a private developer undertook development on two adjacent parcels in downtown Salem, one privately owned, and one publicly owned. The private developer built a hotel. The Agency constructed a conference center and a parking garage that extended under both parcels. The Agency paid nothing into the hotel construction. However, the Agency leased a portion of the parking spaces in the parking garage to the hotel owner, and required as a term of the lease that the hotel owner build certain tenant improvements for the benefit of the Agency.

The Agency paid Davis-Bacon wages on the conference center and the parking garage because federal funds were involved. The hotel owner paid prevailing wage rates for the Agency tenant improvements.

BOLI argued that the work on the hotel itself was subject to prevailing wage rates.

The Marion County Circuit Court concluded that the hotel was NOT a public work because the work was not “carried on or contracted for” by the Agency. No funds of the public agency were used in constructing the hotel.

BOLI has appealed the decision³ to the Oregon Court of Appeals, and briefing is underway.

LEGISLATION 2007 – HB 2140

The pendency and disposition of these cases influenced BOLI’s legislative agenda in both 2005 and 2007. The major changes came in 2007 with the passage of HB 2140, now codified in ORS 279C.880 - .870. See Attachment 1. The Commissioner has adopted administrative rules at OAR 839-025-0004 et. seq. See excerpts from the rules, Attachment 2.

Operative Language

ORS 279C.840(1) is deceptively simple:

“The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all *public works* shall be not less than the prevailing rate of wage for an hour’s work in the same trade or occupation in the locality where the labor is performed.” (Emphasis provided.)

Definition of “Public Work”

³ BOLI has also appealed the Court’s supplemental judgment awarding the Agency attorney fees and expenses.

ORS 279C.800(6)(a) defines public work.⁴

“(6)(a) “Public works” includes, but is not limited to:

(A) Roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest;

(B) A project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and \$750,000 or more of funds of a public agency; or

(C) A project for the construction of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency.

(b) “Public works” does not include:

(A) The reconstruction or renovation of privately owned property that is leased by a public agency; or

(B) The renovation of publicly owned real property that is more than 75 years old by a private nonprofit entity if:

(i) The real property is leased to the private nonprofit entity for more than 25 years;

(ii) Funds of a public agency used in the renovation do not exceed 15 percent of the total cost of the renovation; and

(iii) Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before July 13, 2007. [2003 c.794 §165; 2007 c.764 §34]”

Subsection (A) is unchanged from prior law under which the PDC and Salem cases were decided. Subsections (B) and (C) add new definitions for certain kinds of “privately owned” projects. There are also two exceptions to the definitions which have not been significant in the application of the new law.

⁴ Interestingly, there is no statutory definition of “project.”

Exemptions to the Application of Prevailing Wage Rates

ORS 279.810(2) lists exemptions to the application of prevailing wage rates.

“(2) ORS 279C.800 to 279C.870 do not apply to:

(a) Projects for which the contract price does not exceed \$50,000. In determining the price of a project, a public agency:

(A) May not include the value of donated materials or work performed on the project by individuals volunteering to the public agency without pay; and

(B) Shall include the value of work performed by every person paid by a contractor or subcontractor in any manner for the person’s work on the project.

(b) Projects for which no funds of a public agency are directly or indirectly used. In accordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries shall adopt rules to carry out the provisions of this paragraph.

(c) Projects:

(A) That are privately owned;

(B) That use funds of a private entity;

(C) In which less than 25 percent of the square footage of a completed project will be occupied or used by a public agency; and

(D) For which less than \$750,000 of funds of a public agency are used.

(d) Projects for residential construction that are privately owned and that predominantly provide affordable housing. As used in this paragraph:

(A) “Affordable housing” means housing that serves occupants whose incomes are no greater than 60 percent of the area median income or, if the occupants are owners, whose incomes are no greater than 80 percent of the area median income.

(B) “Predominantly” means 60 percent or more.

(C) “Privately owned” includes:

(i) Affordable housing provided on real property owned by a public agency if the real property and related structures are leased to a private entity for 50 or more years; and

(ii) Affordable housing owned by a partnership, nonprofit corporation or limited liability company in which a housing authority, as defined in ORS

456.005, is a general partner, director or managing member and the housing authority is not a majority owner in the partnership, nonprofit corporation or limited liability company.

(D) “Residential construction” includes the construction, reconstruction, major renovation or painting of single-family houses or apartment buildings not more than four stories in height and all incidental items, such as site work, parking areas, utilities, streets and sidewalks, pursuant to the United States Department of Labor’s “All Agency Memorandum No. 130: Application of the Standard of Comparison “Projects of a Character Similar” Under Davis-Bacon and Related Acts,” dated March 17, 1978. However, the commissioner may consider different definitions of residential construction in determining whether a project is a residential construction project for purposes of this paragraph, including definitions that:

- (i) Exist in local ordinances or codes; or
- (ii) Differ, in the prevailing practice of a particular trade or occupation, from the United States Department of Labor’s description of residential construction.” [2003 c.794 §172; 2005 c.153 §1; 2005 c.360 §8; 2007 c.764 §35]

Funds of a Public Agency

Most of the discussion in analyzing the application of prevailing wage rates to public private-partnerships revolves around determining the public’s participation in a privately owned project. OAR 839-025-0004(9)(a) defines “directly” and “indirectly” used funds of a public agency.

“(9)(a) "Funds of a public agency" includes any funds of a public agency that are directly or indirectly used, as described below.

(A) "Directly used funds of a public agency" means revenue, money, or that which can be valued in money collected for a public agency or derived from a public agency's immediate custody and control, and, except as provided in ORS 279C.810(1)(a)(H) and (J) and subsection (b) of this section, includes but is not limited to any money loaned by a public agency, including the loan of proceeds from the sale of conduit or pass-through revenue bonds for the specific purpose of financing a project, and public property or other assets used as payment for all or part of a project.

(B) "Indirectly used funds of a public agency" means, except as provided in subsection (b) of this section, that a public agency ultimately bears the cost of all or part of the project, even if a public agency is not paying for the project directly or completing payment at the time it occurs or shortly thereafter. A public agency does not indirectly use funds of a public agency when it elects not to collect land

rent that is due. Examples of when an agency "ultimately bears the cost" of all or part of a project include but are not limited to:

- (i) Amortizing the costs of construction over the life of a lease and paying these costs with funds of a public agency during the course of the lease;
- (ii) A public agency subsidizing the costs of construction that would normally be borne by the contractor;
- (iii) Using insurance proceeds that belong to a public agency to pay for construction. Insurance proceeds represent "money collected for the custody and control of a public agency" and therefore are funds of a public agency, whether the contractor obtains payment directly from the insurance company or the public agency; or
- (iv) Using or creating a private entity as a conduit for funding a project when the private entity is in fact an alter ego of the public agency."

There are both statutory and administrative rule exemptions to the definition of "funds of a public agency." ORS 279C.810(1)(a) and OAR 839-025-0004(9)(b), provide:

"(a) Funds of a public agency" does not include:

(A) Funds provided in the form of a government grant to a nonprofit organization, unless the government grant is issued for the purpose of construction, reconstruction, major renovation or painting;

(B) Building and development permit fees paid or waived by the public agency;

(C) Tax credits or tax abatements;

(D) Land that a public agency sells to a private entity at fair market value;

(E) The difference between:

(i) The value of land that a public agency sells to a private entity as determined at the time of the sale after taking into account any plan, requirement, covenant, condition, restriction or other limitation, exclusive of zoning or land use regulations, that the public agency imposes on the development or use of the land; and

(ii) The fair market value of the land if the land is not subject to the limitations described in subparagraph (i) of this paragraph;

(F) Staff resources of the public agency used to manage a project or to provide a principal source of supervision, coordination or oversight of a project;

(G) Staff resources of the public agency used to design or inspect one or more components of a project;

(H) Moneys derived from the sale of bonds that are loaned by a state agency to a private entity, unless the moneys will be used for a public improvement;

(I) Value added to land as a consequence of a public agency's site preparation, demolition of real property or remediation or removal of environmental contamination, except for value added in excess of the expenses the public agency incurred in the site preparation, demolition or remediation or removal when the land is sold for use in a project otherwise subject to ORS 279C.800 to 279C.870; or

(J) Bonds, or loans from the proceeds of bonds, issued in accordance with ORS chapter 289 or ORS 441.525 to 441.595, unless the bonds or loans will be used for a public improvement.”

APPLICATION OF 2007 LAW TO PUBLIC-PRIVATE PARTNERSHIPS

To analyze a question of the application of prevailing wage rates to a “simple” public-private partnership in real estate development, I offer the following approach:

1. Determine the scope of the “project” that may be a public work.

One useful addition in 2007 was the authority for the Commissioner to divide privately owned projects to separate the parts of the project that includes funds of a public agency or will be occupied or used by a public agency from the part that does not include funds of a public agency and that will not be used or occupied by a public agency. ORS 279.827(2). The Commissioner will apply the considerations of ORS 279C.827(1)(c) in making the determination. These are:

“(c) In making determinations under this subsection, the commissioner shall consider:

(A) The physical separation of the project structures;

(B) The timing of the work on project phases or structures;

(C) The continuity of project contractors and subcontractors working on project parts or phases;

(D) The manner in which the public agency and the contractors administer and implement the project;

(E) Whether a single public works project includes several types of improvements or structures; and

(F) Whether the combined improvements or structures have an overall purpose or function.

If the Commissioner divides the project, any part of the project that does not include funds of a public agency and that will not be occupied or used by a public agency is not subject to prevailing wage rates. ORS 279C.827(2).

2. **Determine whether any public funds of a public agency are involved in the privately owned project.** If, based on the definitions and exemptions, NO public funds are involved, prevailing wage rates do not apply.

3. **Determine if public funds involved exceed \$750,000.** If yes, the project is a public work, and prevailing wage rates apply. Again, the decision is based on the exemptions and definitions.

APPLICATION OF 2007 LAW TO OTHER PUBLIC – PRIVATE TRANSACTIONS

There are a number of other instances where the private and public sectors participate in real estate transactions. An obvious case is in the public exercising its regulatory powers in making land division, land use and building permit decisions. Some of these issues have been raised to BOLI.

- **City requires oversizing of utility lines in a proposed subdivision.** BOLI has determined that where City pays the difference between the cost of the line to serve the subdivision and the cost to serve other later development, and also contracts for a connector line to serve other development, the entire utility line project is a public work subject to prevailing wage rates (*Troutdale*).
- **City requires streets and utilities to be built by private developer at its own cost as a condition of subdivision approval, and thereafter dedicated to the public.** BOLI has determined if there are no public funds in the construction, the utilities and roads construction are not subject to prevailing wage rates (*Springfield*).
- **City or urban renewal agency waives or pays system development charges (SDC's) for a development.** No written opinion on this issue.

SUMMARY

HB 2140 in 2007 gave some certainty to the application of prevailing wage rates to public-private development scenarios. However, the experience with BOLI interpretation is very short. In March 2008, Governor Kulongoski appointed a new Labor Commissioner, Brad Avakian. The law still allows significant discretion in the Commissioner, who will, one hopes, apply the law reasonably and without bias.